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The Massachusetts Department of Environmental Protection's Action on the *Kids vs. Global Warming* Petition

I. Introduction of the *Kids vs. Global Warming* Petition

On November 1, 2012, pursuant to M.G.L. c. 30A, §4, Eshe Sherley, a student at Yale University, along with 358 youth from the Boston public schools who are members of Youth Climate Action Network (YouthCAN)¹, several students from Boston College Law School and representatives from Kids vs. Global Warming² (collectively referred to as the “petitioners”), filed with MassDEP a “Petition for Promulgation of a Rule to Strictly Limit and Regulate Greenhouse Gas Emissions and to Establish an Effective Annual Emissions Reduction Strategy That Will Achieve Massachusetts’ Statutory Obligations.” (Hereafter referred to as the “*Kids vs. Global Warming* petition” or the “petition.”)

Pursuant to the regulatory requirements under 310 CMR 2.03 and 2.04, MassDEP held a public meeting on June 13, 2013, to consider the petition and to take comments and questions on the petition. At the meeting, MassDEP received additional comments from the members of YouthCAN at the Boston Latin School and students from Boston College Law School. Verbal and written comments from a coalition of environmental advocacy organizations, and Our Children’s Trust, were also received.

Under the regulations, within ten days after the meeting, MassDEP must determine whether to schedule the petition for further proceedings in accordance with 310 CMR 2.05 or 2.06, and thereafter notify the petitioners of MassDEP’s action. For the reasons stated below, MassDEP hereby agrees with the petitioners that the Commonwealth of Massachusetts must adopt regulations and programs to reduce Green House Gas (GHG) emissions to achieve the goals established in the *Kids vs. Global Warming* petition. Therefore, it is not necessary for MassDEP to schedule further proceedings on the proposed regulation attached to the petition.

¹ http://www.blsyouthcan.org/BLS_Youth_C.A.N./Welcome.html

² Kids vs. Global Warming is a non-profit organization representing the youth in Massachusetts and youth around the country who are concerned about climate crisis. <http://kvgw.org/>.

II. Applicable State Law for Filing and Responding to the Petition

Under M.G.L. c. 30A, §4, “[a]ny interested person may petition an agency requesting the adoption, amendment or repeal of any regulation, and may accompany his petition with such data, views and arguments as he thinks pertinent. Each agency shall prescribe by regulation the procedures for the submission, consideration and disposition of such petitions.” M.G.L. c. 30A, §4.

Moreover, MassDEP’s Adopting Administrative Regulations set forth at 310 CMR 2.00 detail what must be included in a petition and how MassDEP must respond to such petition. 310 CMR 2.02 states that:

Any interested person or his attorney may at any time petition the department to adopt, amend, or repeal any regulation... All petitions shall be signed by the petitioner or his attorney, contain his address..., and set forth clearly and concisely the text of the proposed regulation. The petition may be accompanied by any supporting data, views or arguments.

310 CMR 2.03 states that:

Upon receipt of a petition for the adoption, amendment or repeal of a regulation submitted pursuant to 310 CMR 2.02...the department shall consider the petition ...at a meeting and shall, thereupon, determine whether to schedule the petition... for further proceedings in accordance with 310 CMR 2.05 or 310 CMR 2.06 [procedures for rulemaking with or without public hearing].³ If the regulation has been presented to the department by petition..., the department shall within ten days after the meeting notify the petitioner of the department’s action.

310 CMR 2.04 states that:

During the meeting..., the department may, but shall not be required to, entertain comments or questions from members of the audience.

III. The *Kids vs. Global Warming* Petition

The Petitioners’ Request

In the *Kids vs. Global Warming* petition, the petitioners requested that MassDEP adopt rules and regulations to reduce carbon dioxide (CO₂) and other greenhouse gas (GHG) emissions and prevent further GHG emissions into the environment.

The petitioners specifically requested that MassDEP promulgate a rule or rules that require MassDEP to take steps to protect the integrity of Massachusetts’ atmospheric resources, climate system, and shorelines, by adequately protecting our atmosphere, a public trust resource upon

³ 310 CMR 2.05 sets forth the procedure to follow for the adoption, amendment or repeal of regulations where no public hearing is required. 310 CMR 2.06 sets forth similar procedure where a public hearing is required.

which all Massachusetts residents rely for their health, safety, sustenance, and security.⁴ They also request that MassDEP take the following action:

- (i) Publish rules they deem required by M.G.L c. 21N, § 3(d) establishing declining levels of annual aggregate emission rates.
- (ii) Prepare and implement a plan to ensure that, starting in 2013, statewide fossil fuel carbon dioxide emissions are reduced by an aggregate 6% per year taking into account the current Massachusetts emissions reductions already underway, or the annual percent necessary to meet targets set forth in the GWSA.⁵
- (iii) Publish annual progress reports on statewide GHG emissions on MassDEP's website for public review. The reports are requested to include a more detailed accounting and inventory than is currently available for each and every substantial source of GHG emissions within the Commonwealth, including, energy facilities, transportation, buildings, and other large non-energy facility emissions sources. This inventory and accounting is requested to be verified by an independent, third party.
- (iv) Consider ways to reduce GHG emission by more than 25% by 2020 and issue a report to the legislature and the public regarding its findings by December 31, 2013.
- (v) Adopt any necessary policies or regulations to implement the GHG emissions reduction plan, as described above.

Pursuant to 310 CMR 2.03, the petitioners also requested a public meeting on the petition, and an opportunity to meet with and present their petition to MassDEP.⁶

Petitioners' Statement of Reasons for Filing the Petition

The petitioners' statement of reasons for filing the petition argues that MassDEP should grant the petition and promulgate the regulation attached to the petition because "the science unequivocally shows that anthropogenic climate change is occurring and is threatening the stability of the global climate."⁷ The statement of reasons details that the current CO₂ concentration in the atmosphere is over 390 ppm and is quickly approaching the dangerous level of 400 ppm.⁸ It further explains the impact that the high level of CO₂ concentration is having on global warming in the atmosphere, surface temperatures and ocean temperatures.⁹ The petitioners also claim that climate change is already occurring in the Commonwealth of Massachusetts and is projected to significantly affect the State in the future. They further claim that [t]he increase in CO₂ concentrations has impacted the weather pattern, water supply, plants

⁴ See *Kids vs. Global Warming petition*, p 4, at http://ourchildrenstrust.org/sites/default/files/2012.10.31-FINAL%20MA%20Petition_0.pdf.

⁵ Following the filing of the petition, Our Children's Trust submitted additional information that stated that MassDEP only needs to reduce annual emissions by 3% and not 6% to meet the goals set by the world's leading climate scientists.

⁶ See *Kids vs. Global Warming petition*, p.41.

⁷ *Id.* at 7.

⁸ *Id.* at 9.

⁹ *Id.* at 8.

and wildlife, health, and the economy. In the petition, they argue that “atmospheric carbon dioxide concentrations must be reduced to 350 ppm.”¹⁰

The Petitioners also argue that “[t]he atmosphere, essential to human existence is an asset that belongs to all people. The public trust doctrine requires that as a trustee, the Commonwealth of Massachusetts and the Governor, through the Department of Environmental Protection and the Executive Office of Energy and Environmental Affairs hold vital natural resources in *trust*, for both present and future generation of its citizens.”¹¹

IV. MassDEP’s Action on the *Kids vs. Global Warming* Petition

After reviewing the supporting data, views and arguments contained in the *Kids vs. Global Warming* petition, and the comments received at the June 13, 2013 public meeting, MassDEP is taking the following action on the *Kids vs. Global Warming* petition:

MassDEP agrees with the petitioners that the increase in CO₂ emissions has significantly contributed to the effects of global warming and that it is the Commonwealth’s responsibility to take the necessary steps “to protect the integrity of Massachusetts’ atmospheric resource, climate system, and shorelines by adequately protecting our atmosphere.” However, MassDEP believes that it can achieve the same goals articulated in the petition by adopting and implementing the regulations, policies and programs required under the Global Warming Solutions Act (GWSA) and included in the Massachusetts Clean Energy and Climate Plan (CECP) for 2020, as described below. Therefore, MassDEP does not intend to schedule the petitioners’ proposed regulation attached to the petition for rulemaking under 310 CMR 2.05 or 310 CMR 2.06. Beyond the actions MassDEP has already taken to meet GWSA, MassDEP proposes for rulemaking additional GHG reduction measures identified below.

Furthermore, the Commonwealth agrees with the petitioners that “[t]he atmosphere, essential to human existence is an asset that belongs to all people.” It also agrees with the petitioners that climate change is a worldwide concern because if it continues, there will be a significant impact on people, natural resources, and economic conditions around the globe. MassDEP takes its responsibility to protect the atmosphere very seriously, and it will continue to use its existing statutory authority to adopt rules and regulations to reduce GHG emissions that contribute to climate change. MassDEP also believes that these specific statutory obligations supplant the public trust doctrine, so it need not decide whether there is a common law obligation to take action to avert climate change.

MassDEP’s Responsibility and Leadership in Climate Change

MassDEP acknowledges that it has a responsibility to protect the citizens of Massachusetts and future generations from the negative effects of climate change by taking the necessary measures

¹⁰ *Id.* at 26.

¹¹ *Id.* at 37.

to reduce GHG emissions in Massachusetts. MassDEP strongly believes that climate change is the most serious environmental challenge of our time, and it will use its authority, in conjunction with the authority granted to other state agencies, to: (1) lower the GHG emissions that contribute to climate change; (2) reduce demand for carbon-intensive electricity generation and fuels; and (3) take steps to increase the supply of renewable energy in the Commonwealth.

Massachusetts' responsibility and authority to regulate GHG emissions and prevent climate change comes from several sources. First, under Article 97 of the Massachusetts Constitution, MassDEP has the responsibility to protect the people's right to "clean air and water." Second, under M.G.L. c. 21A, §2, MassDEP has the responsibility for protecting human health and the environment by ensuring clean air and water, the safe management and disposal of solid and hazardous wastes, the timely cleanup of hazardous waste sites and spills, and the preservation of wetlands and coastal resources. Under this statutory language, MassDEP shall protect and enhance the Commonwealth's natural resources – air, water, land – and provide for the health, safety, welfare and enjoyment of the people and the protection of their property. Furthermore, the Massachusetts legislature has given MassDEP explicit authority to adopt rules and regulations to prevent pollution and undue contamination of the atmosphere: M.G.L. c. 111, §142A-O (known as the Massachusetts Clean Air Act). This statutory language provides MassDEP with broad authority to adopt regulatory measures to prevent pollution or contamination of the atmosphere. In fact, MassDEP has adopted some of the most stringent regulations in the country to reduce air pollution, including GHG emissions, under this statutory authority. (*See* 310 CMR 7.00 *et al.*).

Massachusetts has also been a leader in the fight against climate change by implementing a unique set of statutes and regulations that will significantly reduce GHG emissions. In 2008, five key environmental laws were approved by the state legislature and signed by the Governor: The Green Communities Act, the Global Warming Solutions Act (GWSA), the Oceans Management Act, the Clean Energy Biofuels Act, and the Green Jobs Act. In addition, in 2012, the legislature passed and the Governor signed the Energy Act of 2012. Under this new authority, MassDEP, along with its sister agencies, will implement and maintain programs that target significant reductions in GHG emissions, boost energy efficiency and renewable sources of energy, and expand green jobs in Massachusetts.

Under the GWSA, Massachusetts is one of the first states in the nation to move forward with a comprehensive regulatory program to address climate change. The GWSA identified the steps for setting stringent, but cost-effective, emissions limits that will result in a clean energy marketplace and significantly reduce GHG emissions. It required MassDEP to create an inventory of GHG emissions and project business as usual emissions if the state did not implement any GHG reducing measures.

The GWSA then required Massachusetts to establish an economy-wide cap on carbon emissions, beginning with a 10-25 percent reduction below 1990 levels by 2020 and culminating with at least an 80 percent reduction below 1990 levels by 2050.¹² In December 2010, the Secretary of Energy and Environmental Affairs (EEA), set an economy-wide GHG emissions target of 25 percent, the maximum authorized by law, and published the Massachusetts Clean Energy and

¹² M.G.L. c. 21N, §§ 3 and 4. www.mass.gov/legis/laws/seslaw08/s1080298.htm

Climate Plan for 2020 (CECP) that includes numerous regulations and programs the Commonwealth will adopt to meet the goal of a 25 percent reduction of GHG emissions by 2020.¹³ The CECP includes policies, programs and regulations that will reduce GHG emissions from all sectors of GHG emissions: electricity generation, commercial, industrial, manufacturing, residential and transportation.

The GWSA also required MassDEP to develop a reporting program of GHG emissions from all facilities that are required to report under title V of the Clean Air Act and any other facilities that emit greater than 5,000 short tons of CO₂e per year.¹⁴ This requires the reporting of GHG emissions from traditional stack emissions, manufacturing processes, and on-road and off-road motor vehicles owned or leased by the facility. Retail electricity sellers must also report GHG emissions based on total megawatt hours of electricity consumed by Massachusetts customers. This mandatory GHG reporting program ensures a rigorous and consistent accounting of GHG emissions and provides reporting tools and formats for the collection of data. The reporting data will help inform the Commonwealth on the success of the strategies adopted under the CECP to achieve the GWSA's reduction goals for 2020, 2030, 2040 and finally 2050.

Section 3(d) of the GWSA requires MassDEP to promulgate regulations establishing a desired level of declining annual aggregate emission limits for sources or categories of sources that emit GHG emissions.

By implementing the measures included in the CECP and listed below, Massachusetts intends to achieve the goal of 25 percent reduction of GHG emissions from the 1990 GHG emission levels by 2020, with an ultimate goal of achieving an 80 percent reduction in GHG emissions by 2050. These measures will have the effect of first quantifying existing GHG emissions, stabilizing existing GHG emissions, and then dramatically reducing GHG emissions from all sectors across the economy. In fact, MassDEP has already adopted and implemented several programs that will reduce GHG emissions.

MassDEP's Measures to Reduce GHG Emissions

To date, MassDEP has adopted and is implementing the following measures to reduce GHG emissions:

1. The Mandatory GHG Reporting Regulations, 310 CMR 7.71, requires facilities emitting greater than 5,000 short tons of CO₂e,¹⁵ facilities that have a title V operating permit, and retail sellers of electricity, to report annually their GHG emissions to MassDEP. This program provides MassDEP with an annual accounting of GHG emissions from the applicable facilities and can be used to help determine the impact from implementing the measures required under the GWSA. It also requires the facilities to hire a third party consultant to verify their GHG emissions and make information submitted available to the public electronically.

¹³ <http://www.mass.gov/eea/docs/eea/energy/2020-clean-energy-plan.pdf>

¹⁴ M.G.L. c. 21N, §2.

¹⁵ CO₂e or CO₂ equivalent means the quantity of a given greenhouse gas multiplied by its global warming potential (GWP).

2. The Massachusetts CO₂ Budget Trading Program, 310 CMR 7.70, otherwise known as the Regional Greenhouse Gas Initiative (RGGI), established the first in the country GHG cap and trade program among ten (now nine) northeastern states. RGGI has successfully capped GHG emissions at 160 million short tons in the RGGI region for the electricity sector. Overall, the program has enabled a \$617 million investment in the region's clean energy future by reducing energy bills for residents and businesses, helping businesses become more competitive, accelerating the development of local clean and renewable energy sources, and limiting the release of harmful pollutants into the air and atmosphere, while spurring the creation of jobs in the region.
3. Amendments to the Low Emission Vehicle Program, 310 CMR 7.40, adopted the California Clean Vehicle Standards so that the motor vehicles sold in Massachusetts must meet California's GHG emissions standards.
4. Amendments to the Low Sulfur Fuel Regulations, 310 CMR 7.04, require boilers to use lower sulfur fuel which means boilers will be more efficient, thereby resulting in reductions in GHG emissions.
5. Tailoring Rule, 310 CMR 7.00: Appendix C(2)(a)1 requires facilities with emissions greater than 100,000 short tons of CO₂e to apply for a title V operating permit, or amend their existing title V operating permit to include the GHG applicable requirements to which they are subject.
6. Massachusetts Electric Vehicle Incentive Program. MassEVIP offers incentives to municipalities to purchase battery-electric (\$7500) and/or plug-in hybrid vehicles (\$5000) and offers financial assistance of up to \$15,000 for the purchase and installation of Level 2 charging stations. The program is open to all municipalities in the Commonwealth with preference given to those municipalities that are registered as Green Communities and/or have an environmental justice community.¹⁶
7. GHG Dashboard Program. The GHG dashboard tracks GHG emissions from residents, businesses, vehicles, electricity and other sources, to help Massachusetts monitor the progress being made toward the goals of the GWSA. It also tracks the increase in renewable energy facilities and the amount of electricity saved each year through energy efficiency measures.¹⁷ All relevant agencies are working together to develop and promote adequate monitoring, reporting, and record keeping metrics to track GHG reduction performance. This work has begun and will be ongoing in consultation with the GWSA Implementation Advisory Committee.
8. The Clean Energy Results Program (CERP). The Clean Energy Results Program is a first-of-its-kind partnership between Massachusetts Department of Energy Resources (DOER), MassDEP, and the Massachusetts Clean Energy Center (CEC). This

¹⁶ <http://www.mass.gov/eea/agencies/massdep/air/grants/massevip.html>

¹⁷ <http://www.mass.gov/eea/air-water-climate-change/climate-change/massachusetts-global-warming-solutions-act/global-warming-solutions-act-dashboard.html>

partnership advances environmental protection by promoting the development of renewable energy and energy efficiency projects in Massachusetts. It also ensures that clean energy projects are sited in a way that is environmentally protective. The Massachusetts CEC is a key partner in state efforts to promote clean energy. See the CERP Quarterly Progress Report, April 2013.¹⁸

9. The Solid Waste Master Plan. The Solid Waste Master Plan includes a variety of measures that will help decrease the amount of plastics combusted in Massachusetts, by increasing the recycling and reuse of plastics. Measures to increase plastics recycling and reuse include: Sustainable Materials Recovery Program (SMRP), Municipal Grants to encourage communities to adopt Pay As You Throw, the Recycling Loan Fund, technical assistance to businesses, and the Reuse Marketplace to allow businesses with excess materials to find others that could use that material rather than dispose of it.

Furthermore, in recognition of the commitment and responsibility that MassDEP has to reduce GHG emissions, MassDEP intends to adopt in the near future, the following measures:

1. Amendments to the Regional Greenhouse Gas Initiative, 310 CMR 7.70 (RGGI). The amendments will lower the regional emissions cap to 91 million short tons of CO₂. Under agreements with other states in the Regional Greenhouse Gas Initiative, MassDEP must finalize amendments to the RGGI regulations by the end of 2013. This will result in a 45% reduction in GHG emissions starting in 2014, and an additional 2.5% per year reduction to the regional cap for the years 2015 through 2020. Massachusetts' portion of the new cap will be approximately 14 million short tons.
2. Prevention of Significant Deterioration (PSD) Regulations. On April 4, 2011, MassDEP accepted full delegation of the federal PSD program including the applicability thresholds for the GHG emissions, 40 CFR 52.21, pursuant to the terms of the delegation agreement and the Clean Air Act. MassDEP also intends to propose amendments to its existing air pollution rules to require biomass sources that have potential to emit greater than 100,000 tons of GHG emissions to obtain a PSD permit. Implementation of the federal PSD program and revisions to MassDEP' regulations mean that Massachusetts facilities that have GHG emissions greater than the applicable threshold will be subject to the Best Available Control Technology, which can reduce GHG emissions. MassDEP expects the proposed amendments to the air regulations to go out for public hearing and comment in the fall of 2013.
3. Refrigerant System Emissions, 310 CMR 7.73. MassDEP intends to propose regulations to reduce high global warming potential emissions from non-residential refrigerant equipment, based on a California Refrigerant Rule. The regulation would affect facilities with refrigeration units containing at least 50 pounds of refrigerant and require the facilities to register the units, install leak detection systems or conduct leak detection inspections, perform leak repairs when necessary and retrofit or retire systems when

¹⁸ <http://www.mass.gov/eea/docs/dep/energy/cerpqr0413.pdf>

necessary. MassDEP expects the proposed regulation will go out for public hearing and comment in 2013.

4. SF₆ Regulations, 310 CMR 7.72. MassDEP will propose regulations that will establish an annual declining cap on the emissions of sulfur hexafluoride (SF₆), a high global warming potential (GWP) substance, from large sources of gas insulated switchgear used in electricity transmission and distribution systems. MassDEP expects the proposed regulations will go out for public hearing and comment in summer 2013.
5. Regulatory Waste Bans. MassDEP will propose amendments to the solid waste ban regulations to divert organic materials from the solid waste stream. MassDEP expects the organic materials ban amendments to go out for public hearing and comment in summer 2013. MassDEP expects to continue development of a carpet ban once staffing resources allow.
6. Analysis of a Clean Energy Performance Standard (CEPS). MassDEP, DOER and the Department of Public Utilities (DPU) are examining issues with adopting and implementing CEPS that may require electricity suppliers to favor lower- and no-emissions sources in the mix of electricity delivered to their customers. The combined agencies expect to have a draft report on CEPS options by the fall 2013.
7. Transportation Conformity. MassDEP intends to include certain GreenDOT commitments in a transportation conformity-like process for GHG emissions from transportation. Transportation Conformity is a process required under the federal Clean Air Act in nonattainment areas where states and metropolitan planning organizations are required to demonstrate that transportation activities do not interfere with an area's ability to attain and maintain clean air. This includes, but is not limited to, an analysis that emission limits are not exceeded as a result of transportation projects, programs, or plans. MassDEP will work with other EEA agencies, the Massachusetts Department of Transportation (MassDOT) and the Clean Energy and Climate Plan Transportation subcommittee to design this initiative by the end of the 2014 calendar year.
8. Interim Emission Limits. As per the GWSA, EEA and its agencies will set 2030 and 2040 interim emissions limits to "maximize the ability of the Commonwealth to meet the 2050 emissions limit."

Along with the above regulations to reduce GHG emissions, other Massachusetts agencies have adopted numerous regulations and programs to reduce GHG emissions in order to meet the 25% reduction by 2020 mandate. Some of the measures that state agencies have adopted include a massive investment in energy efficiency, which has made Massachusetts first in the nation on energy efficiency, according to a well-known national rating system, an increase in the compliance obligation under the Renewable Energy Portfolio Standard (RPS), an increase in the development of solar photovoltaic (PV) to meet the Governor's next goal of 1,600 MW by 2017, and amendments to the Massachusetts Environmental Policy Act (MEPA) regulations to require owners of projects that trigger the MEPA thresholds to consider the project's impact on climate change and ways to mitigate such impacts. Moreover, Massachusetts has taken the lead to

reduce GHG emissions and increase energy efficiency at state-owned facilities by purchasing hybrid and alternative fuel vehicles, contracting for energy management services and supporting energy efficiency and renewable energy for construction and renovation projects. For more details on these programs and other programs Massachusetts agencies have adopted to help meet the 25% reduction goals and the progress Massachusetts is making to achieving that goal, see the “GWSA Implementation Subcommittee, Clean Energy and Climate Plan for 2020 Summary Report, dated June 3, 2013.”¹⁹

Each of the above laws, together with several new groundbreaking policies and programs, will help Massachusetts address climate change and achieve the goals identified in the *Kids vs. Global Warming* petition.

The Public Trust Doctrine

The above analysis shows that there are a number of specific statutes that impose obligations on MassDEP as well as other agencies to lower GHG emissions, and the Commonwealth is moving forward in a comprehensive manner to implement these statutes. Given the specificity of the statutory mandates, we believe that they supplant any obligation the Commonwealth would have to curb GHG which may be derived from the public trust doctrine.

Stated another way, we believe that the common law public trust doctrine might have vitality in a state which is otherwise ignoring a statutory duty to lower GHG emissions. However, where, as here, we are in a state which is fulfilling its duty to protect the atmosphere by complying with statutes that impose specific GHG emission reduction obligations, we believe that the public trust doctrine does not add to the obligations that the legislature has already imposed.

Under Massachusetts law, it has long been understood that “where a statute has been enacted seemingly intended to cover the whole subject to which it relates, including a remedy for its infraction, other provisions of the common law, including such as are remedial in nature, are thereby superseded.” George v. National Water Main Cleaning Co., 286 F.R.D. 168, 187 (D. Mass. 2012) (quoting School Comm. of Boston v. Reilly, 362 Mass. 334, 338 (1972)). Original quotation from School Comm. of City of Lowell v. City of Lowell, 265 Mass. 353, 356 (1928). In addition, the United States Supreme Court stated in Mohamad v. Palestinian Authority that “[w]hile Congress is understood to legislate against a background of common-law adjudicatory principles, Congress plainly can override those principles.” Mohamad v. Palestinian Authority, 132 S. Ct. 1702, 1709 (2012).

MassDEP’s Responsibility to Regulate GHG Emissions under Federal Law

In addition to the specific Massachusetts statutory mandates to regulate GHG emissions, MassDEP has a responsibility to regulate GHG emissions pursuant to the federal Clean Air Act, 42 U.S.C. 7401. On April 2, 2007, in Massachusetts v. EPA, 549 U.S. 497 (2007), the Supreme Court found that GHGs are air pollutants covered by the Clean Air Act. The Court held that the Administrator must determine whether or not GHG emissions from new motor vehicles cause or

¹⁹ <http://www.mass.gov/eea/docs/eea/gwsa/subcommittee-update-reports-on-2020-plan.pdf>

contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision. In making these decisions, the Administrator was required to follow the language of Section 202(a) of the Clean Air Act. On April 17, 2009, the Administrator signed proposed “endangerment and cause or contribute findings” for GHG under Section 202(a) of the Clean Air Act. Following that action, in May of 2010, EPA finalized emission standards for light-duty vehicles (2012-2016 model years) and in August of 2011, EPA finalized GHG emissions standards for heavy-duty vehicles (2014-2018 model years). Following the findings and the adoption of the motor vehicle emissions standards under Section 202(a), GHG became a “regulated pollutant,” thus requiring EPA to adopt additional regulatory programs under the Clean Air Act. In October 2009, EPA adopted the Greenhouse Gas Reporting Program, which collects GHG data from large emission sources across a range of industry sectors, as well as suppliers of products that would emit GHG if released or combusted.

On May 13, 2010, EPA established GHG emissions thresholds to define when permits under the New Source Review Prevention of Significant Deterioration (PSD) and title V Operating Permit programs are required for new and existing industrial facilities. This final rule “tailors” the requirements of these Clean Air Act permitting programs to limit covered facilities to the nation’s largest GHG emitters: power plants, refineries, and cement production facilities. Then, on March 27, 2012, EPA proposed a Carbon Pollution Standard for New Power Plants that would, for the first time, set national limits on the amount of carbon pollution that power plants can emit. The proposed rule, which applies only to new fossil-fuel-fired electric utility generating units, will help ensure that progress continues toward a cleaner, safer, and more modern power sector.

Regardless of Massachusetts statutory mandates and regulatory requirements, MassDEP and Massachusetts sources that trigger the federal applicability thresholds for GHG, must comply with all of the federal requirements adopted pursuant to the Clean Air Act.

V. Conclusion

MassDEP believes the regulations identified above, in conjunction with the myriad of non-regulatory measures being implemented by other agencies, will ensure that the Commonwealth meets the GHG reduction goals prescribed by the GWSA and the CECP, as well as, the goals included in the *Kids vs. Global Warming* petition. Therefore, it is not necessary for MassDEP to adopt the specific measures included in the Petitioners’ proposed regulation attached to the petition.

Although the petitioners are looking for MassDEP to publish additional rules under M.G.L. c. 21N, § 3(d), MassDEP believes it is compliance with that statute by issuing regulations that achieve the desired level of emission reduction.

The petitioners also want MassDEP to adopt a new regulation requiring a plan to reduce GHG emissions by 3% each year. Since the CECP strategies take effect at different times leading up to the 2020 goal, MassDEP cannot commit to an annual 3% reduction every year. Moreover, while some programs, like the SF₆ and refrigerant rules, will achieve a steady reduction in GHG emissions each year, other programs, such as the vehicle GHG emission standards, will result in

larger reductions as the programs are phased in over the coming years. Thus, the total reduction in GHG emissions will comply with the CECP and ultimately satisfy the petitioners' request.

The petitioners also request in the petition that MassDEP publish by January 31st annual progress reports on statewide GHG emissions from the sources of GHG emissions within the Commonwealth, including energy facilities, transportation, buildings, and other large non-energy facility emissions sources that are beyond the sources currently required to report, and that this inventory and accounting shall be verified by an independent third party. The existing GHG reporting rule for sources greater than 5,000 short tons with third party verification covers a large number of GHG emitting sources in Massachusetts, which clearly satisfies the petitioners' request.²⁰ The Massachusetts GHG reporting rule covers a larger number of stationary and mobile sources, which the federal GHG reporting program does not cover. The GHG Dashboard program will also present annual data on GHG emissions in the Commonwealth. The petitioners have also failed to provide details on which additional sources they would like to be reported that are not currently covered under the GHG reporting program.

Moreover, the GWSA requires MassDEP to publish triennial inventories to document progress on statewide GHG emissions, which also satisfies the petitioners' request. In addition, in the CECP, EEA committed to compile an annual progress report. This report also satisfies the petitioners' request.

The petitioners also request that MassDEP adopt technologically feasible and cost-effective policies, beyond what is currently adopted or proposed, which could reduce CO₂ emissions by as much as 35% by 2020. Pursuant to the GWSA, the Secretary of EEA adopted a goal of 25% reductions from 1990 emission levels by 2020, the maximum amount permitted under the law. MassDEP lacks statutory authority to mandate steeper reductions beyond the 25%. However, MassDEP is already working to achieve the emission reduction goal of 25% by 2020 by implementing the GHG emission reduction measures listed in the CECP, including the RGGI program to reduce GHG emissions from power plants, the California GHG emission standards for Motor Vehicles, analyzing the development of a Clean Energy Performance Standard, reducing leaks of SF₆ from gas insulated switchgear, and working on a program to reduce high GWP refrigerants used in non-residential refrigerating equipment.

Although MassDEP is not going to adopt a 35% reduction goal by 2020, the 25% reduction goal is intended to set Massachusetts on a trajectory to achieve the GWSA's 80% reduction goal by 2050. Meeting the 80% reduction goal by 2050, as required under the GWSA, will help towards reducing atmospheric concentration to 350 ppm of CO₂e by the end of the century, which the petitioners claim is the ultimate goal to protect future generations from the effects of climate change.

For the reasons previously stated, MassDEP has demonstrated its strong commitment and responsibility to protect the environment and to fight climate change, and that it is taking the necessary steps outlined in the *Kids vs. Global Warming* petition to protect the integrity of Massachusetts' atmospheric resources, climate system, and shorelines, by adequately protecting

²⁰ EPA also requires GHG reporting, but the EPA reporting threshold is 25,000 metric tons, more than five times the Massachusetts threshold. Because of the lower threshold, Massachusetts' program covers more than three times the number of facilities (in Massachusetts) covered by EPA's program.

our atmosphere. MassDEP has outlined herein the ongoing measures and additional new measures that it intends to implement to carry out that commitment. Therefore, MassDEP's efforts satisfy the petition without the need to adopt the proposed regulation.

A handwritten signature in black ink, appearing to read 'Kenneth L. Kimmell', is positioned above a horizontal line.

Kenneth L. Kimmell
Commissioner
Department of Environmental Protection